UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RONALD COLLINS, Plaintiff, vs. NDOC, et al., Defendants.	3:13-cv-00255-RCJ-WGC **ORDER** re: Doc. # 95

I. BACKGROUND

At all times relevant to the allegations in this action, Plaintiff was an inmate in the custody of the Nevada Department of Corrections (NDOC). (Amended Complaint, Doc. # 14.)[1] The events giving rise to this litigation took place while Plaintiff was housed at Lovelock Correctional Center (LCC), and Plaintiff is currently housed at Northern Nevada Correctional Center (NNCC). (*Id.*) Plaintiff, a pro se litigant, brings this action against Defendants LCC Warden LeGrand, and Correctional Officers Bail, Park, Ball and Baros, pursuant to 42 U.S.C. § 1983. (See Screening Order, Doc. # 11.)[2]

District Judge Robert Jones' January 6, 2014, screening order concluded that Plaintiff's amended complaint stated colorable claims for retaliatory destruction or loss of property under the First Amendment, and deliberate indifference under the Eighth Amendment relating to conditions of confinement. (Doc. # 11 at 4-6.) The court dismissed all claims alleging violations of due process under the Fourteenth Amendment, all claims for injunctive relief, and all claims against Defendants in their

[1] Refers to court's docket number.

[2] Defendant McDaniel, whose name appears in the caption, was dismissed as a party to this action. (See Screening Order, Doc. # 11 at 8.)

official capacity. (*Id.*) In addition, the court dismissed Defendants NDOC, McDaniel, and Emanuel. (*Id.* at 8.)

II. MOTION TO COMPEL

This court conducted a hearing on Plaintiff's motion to compel (Doc. # 64) on September 5, 2014. (See, Minutes, Doc. # 96.)[3] The motion was granted in part and denied in part (*id.*) The Defendants were directed to provide certain supplemental documentation. On September 15, 2014, Defendants submitted a Notice to the Court Regarding Defendants' Supplemental Responses to Plaintiff's Request for Production of Documents." (Doc. # 95.) This order discusses issues concerning the adequacy of Defendants' supplemental responses to Requests for Production (RFP) 5, 14 and 15. (Doc. # 95 at 2.)

III. DISCUSSION

The Notice Defendants filed as to Request for Production (RFP) numbers 5, 14 and 15 addressed additional documentation the Defendants provided in accordance with the court's disposition of the discovery dispute as to those requests. Request # 5, which was similar to request numbers 14 and 15, sought production of reports or memoranda which pertains to LCC procedures regarding opening of inmate cell doors if the inmate who was then in the "day room" needed to use the toilet. Plaintiff's request and Defendants' response read as follows:

> Request for Production No. 5:
> All policy's (sic) reports or memorandums (sic) instructions to staff that require staff to open inmate's cell doors if they need to use the toilet.
>
> Response to Request for Production No. 5:
> Objection, assumes facts not admitted or in evidence. Objection, overly broad and vague with respect to time frame.
> Notwithstanding these objections and without waiving them, Defendant is unable to locate any such specific policy, report or memo which states when correctional staff is required to open a cell door for an inmate to use the toilet. Defendant states LCC Operational Procedure 418 "Institutional Court Procedure" may be responsive to this request, however, it is maintained as confidential and therefore cannot be disclosed to Plaintiff.

Doc. # 64-1 at 24.

As reflected above, Defendants' discovery response stated no such policy could be located, with the possible exception of Lovelock Correctional Center Operational Procedure (OP) 418, which

[3] Defendants opposed Plaintiff's motion to compel (Doc. # 78) and Plaintiff replied (Doc. # 82).

Defendant stated could not be disclosed because it was confidential. (Doc. # 64-1 at 24.) Defendants did not explain how OP 418 was confidential. Curiously, even though this policy was supposedly confidential, Defendant LeGrand (Warden of LCC) had earlier responded to Plaintiff's grievance regarding the same subject that:

> I have reviewed the "Door Call" policy for the institution and your caseworker's response to this grievance. You were answered appropriately and completely at the Informal level. Unit Door calls are not specific to Protective Segregation, LCC implements this policy for all Units. Unit Staff conducts a door call every 25 minutes. The doors are open for 5 minutes and then closed. Unit 3A staff indicated that if an inmate claims the need to use the toilet they are allowed to come in off the yard or off the tier and go into their cell. Due to Nevada's inclement weather restrictions outside toilets would not be functional, therefore they are not available. Door calls will continue to be implemented throughout the institution.

Doc. # 64-2 at 13; emphasis added.

Plaintiff's RFP ## 5, 14 and 15 each sought similar documents relating to Lovelock Correctional Center's (LLC) "door call" policy, which is the subject of Plaintiff's civil rights action. (Doc # 11, Screening Order.) As noted above, when responding to a grievance about LCC's door call policy, Defendant LeGrand stated he reviewed the door call policy for the institution, which obviously contradicts his discovery response which stated he was unable to locate any such policy. His response to the grievance then went on to discuss the institution's door call policy and why it disposed of Plaintiff's grievances on this issue. (Doc. # 64-2 at 13.) Clearly, when Defendants initially responded to the Plaintiff's request for production numbers 5, 14 and 15, in contrast to the discovery response that "no such policy could be located," indeed such a policy did exist as is documented by Warden LeGrand's response to Plaintiff's grievance.

Thus, it appears that LCC does have a cell door call policy. Because of the contradiction between these two responses, Defendants were directed to provide additional information regarding the cell door call policy at LLC. (Doc. # 96.)

Defendants' Notice supplemented the response to Requests 5, 14 and 15:

> As to the response to RPD's #5, #14 and #15, Defendants provide Lovelock Correctional Center's (LCC Operational Procedure 517. **[COLLINS 255: DEF SUPP RESP TO RPD [1]-031-39].** Further, LCC Post-Order 14-1402 and LCC Post-Order 14-1441" provides door call policy, however these Post-Orders will not be provided to Plaintiff because it is maintained as confidential and therefore cannot be disclosed to Plaintiff.

(Doc. # 95 at 2.

This supplemental response was the first reference to "Post-Orders" and the court cannot discern if the door call policy referred to by Warden LeGrand arises from the Post-Orders referred to in the supplemental discovery response or is a separate document or policy.[4]

Once again, Defendants do not explain how the documents are confidential nor do Defendants assert how production of these documents (perhaps in a limited access area such as the Warden's Office) would implicate any security concerns at LCC. Defendants also do not cite any NDOC authority that certain Post-Orders are confidential or that LCC's door call policy is deemed confidential.

A mere assertion a document relevant to a § 1983 lawsuit is "confidential," without more, does not satisfy a litigant's burden of justifying non-production of what otherwise appears to be a relevant document. Confidentiality in and of itself is not a legitimate grounds of objection. Typically, any assertion of a document's confidentiality is resolved via a protective order. Alternatively, a party, usually a governmental entity or employee of a governmental defendant, will assert the document is protected under the "official documents privilege." But Defendants have not lodged a claim of privilege.

"In a civil right case brought under federal statutes questions of privilege are resolved by federal law." *Kerr v. District Court*, 511 F.2d 192, 197 (9th Cir. 1975); Fed. R. Evid. 501. As the United States District Court for the Northern District of California pointed out:

> It…would make no sense to permit state law to determine what evidence is discoverable in cases brought pursuant to federal statutes whose central purpose is to protect citizens from abuses of power by state and local authorities. If state law controlled, state authorities could effectively insulate themselves from constitutional norms simply by developing privilege doctrines that made it virtually impossible for plaintiffs to develop the kind of information they need to prosecute their federal claims.

Kelly v. City of San Jose, 114 F.R.D. 653, 656 (N.D. Cal. 1987). This does not mean that courts can just ignore state privilege doctrine. See id. ("federal courts generally should give some weight to privacy rights that are protected by state constitutions and state statutes"); see also *Boar, Inc. v. County of Nye*, 2:08-cv-01091-PMP-RCJ, 2010 WL 5070888, at * 2 (D. Nev. Oct. 15, 2010).

Federal law governing privilege has not been codified; instead, "[t]he common law–as interpreted by United States courts in the light of reason and experience–governs any claim of privilege" unless

[4] Defendants produce Operational Procedure 517 but asserted in their initial response to Plaintiff's Request for Production that another Operational Procedure (418) was confidential. No explanation is provided why OP 418 relating to door policy is confidential while OP 517 is not.

otherwise provided by "the United States Constitution; a federal statute; or rules prescribed by the Supreme Court." Fed. R. Evid. 501.

As a result, while the court may give some weight to the State confidentiality interests contained in NDOC Administrative Regulations or Operational Procedures or Post-Orders (even assuming these documents deem the policies to be confidential), they do not control the determination of the applicability of privilege (or confidentiality) in this case as Defendants have argued. Therefore, merely because the Defendants assert a document may be "confidential" will not govern discoverability in a federal court action, particularly where the objecting party fails to state why or how the document is confidential nor cite any relevant federal discovery authority which upholds such an assertion of confidentiality and that discovery or review of such a document is precluded.

As discussed above, Defendant LeGrand's grievance response relied on the application of the institution's door call policy. (Doc. # 64-2 at 13.) The Defendants' discovery response stated that Defendants complied with this policy but then contended the actual policy is confidential and cannot be disclosed. (Doc. # 64-1 at 24). It would be incongruous to allow Defendants to cite a policy and defend this case on that policy, but then assert the position the policy cannot be produced as it is "confidential."

III. ORDER RE DISCOVERY

Defendants shall produce the door call policy referred to by Warden LeGrand in his response to Plaintiff's grievance and/or discovery responses whether contained in an NDOC or LCC Administrative Regulation, Operational Procedure or Post-Order. The production may occur in the Warden's Office. If Defendants wish to argue the door call policy is confidential and should not be produced whatsoever, Defendants shall within ten (10) days submit the door call policy to the Court for an *in camera* inspection in accordance with Local Rule 10-5(a) and file and serve a memorandum of points and authorities satisfying Defendants' claim of confidentiality and why such an assertion should be afforded deference by a U S. District Court in a civil rights action.

IT IS SO ORDERED.

DATED: September 17, 2014.

William G. Cobb

WILLIAM G. COBB
UNITED STATES MAGISTRATE JUDGE